

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:) CHAPTER 13
) CASE NO. 00-41646-JDW
CHRISTCELL S. GRANT,)
STEPHANIE R. GRANT,)
)
DEBTORS)

ORDER

Debtors in this case have filed a Motion To Reconsider Dismissal With Prejudice. This case was dismissed by the Court at the confirmation hearing on November 8, 2000. The Court's Order Dismissing Chapter 13 Case With Prejudice Before Confirmation entered November 17, 2000, provides as follows:

Pursuant to 11 U.S.C. § 1307 this Chapter 13 case is dismissed with prejudice, barring refiling of a petition by the debtor(s) within 180 days of this order due to failure to make promised payments and failure to pay the filing fee/administrative fee (filing fee/administrative fee in the amount of \$185.00 is now due and owing.)

This Court follows the view that Chapter 13 cases may be dismissed with prejudice under two circumstances, the first where a debtor fails to pay the filing fee in a dismissed case, and the second, where the debtor commits some act or omission deemed to be abusive so as to cause the court to conclude that another case within the specified period cannot be brought in good faith. Some dismissals involve both circumstances.

In the first circumstance, where a case is dismissed without prejudice due solely to the failure to pay the filing fee in a previous case, the payment of the previous filing fee at the time of the filing of a new case will automatically remove the prejudice and permit the new case to go forward. The Clerk of the Bankruptcy Court is authorized to make the determination as to whether the filing fee in the previous case is paid and, if it is, to permit the filing of the new case without further consideration by the court. In the absence of the payment of the filing fee from the previous case, the Clerk is instructed to comply with the prejudice order and refuse to allow the filing of the new case. Debtors are ordered to pay filing fees in cases and will be deemed to have willfully failed to comply with that order if the fees are not paid. No additional motion and hearing is necessary as a prerequisite to the entry of such a prejudice order.

The matter of the dismissal of the case for some other cause, the second of the two enumerated circumstances, is a different matter. Since dismissal with prejudice is a punitive step, it is necessary for the debtor to be advised in advance as to the possibility that the court will consider a dismissal with prejudice and, further, to be given an opportunity to show the court why such an order should not be entered. Furthermore, following the entry of such an order, the debtor may seek to have the prejudice removed by filing a motion such as the one the Debtors in this case have filed.

This has the effect of giving the Court the opportunity to review the circumstances which would precede the filing of the next case and to make a judicial determination as to whether the new case can be filed in good faith. This alternative is preferred in this District to the procedure followed in other districts where the new case is allowed to be filed and subsequently tested by a creditor's motion to dismiss as a bad faith filing.

In short, in this District, the burden is on the debtor to show why a debtor in a case previously dismissed with prejudice should be allowed to file again within the specified period. Having reviewed the procedure, the Court next turns to consider the facts in this case preceding the dismissal with prejudice. On October 17, 2000, the Trustee filed a Motion To Dismiss Before Confirmation. The motion provides as follows:

COMES NOW, Sylvia Ford Brown, Chapter 13 Trustee and shows that the above-named debtor has not commenced making the payments proposed by the plan within the thirty (30) days after the plan was filed pursuant to 11 U.S.C. Section 1326.

WHEREFORE, said Trustee moves to dismiss the case for failure to comply with 11 U.S.C. Section 1326.

The Trustee's Notice On Motion provides as follows:

Pursuant to direction by the Court, notice is hereby given that unless the debtor pays the arrearage in full or requests a hearing in writing showing good cause concerning this motion within twenty (20) days of the date shown below, the case

shall be dismissed. COUNSEL IS ADVISED TO COMPLY WITH BANKRUPTCY RULE 9011 IN FILING ANY SUCH REQUEST.

The undersigned hereby certifies that copies of this motion and notice have been forwarded by first-class mail, postage prepaid, to the above-named debtor(s) and the debtor's attorney whose name appears below on the 17th day of October, 2000.

Reading the Trustee's motion, the debtor could not anticipate that this case would be dismissed with prejudice, except perhaps for the possibility of a dismissal in the first category for the failure to pay the filing fee, which prejudice could be removed without any further motion or hearing by the payment of the filing fee at the time of the filing of the subsequent case. In other words, the punitive result, dismissal with prejudice, due to "failure to make promised payments" is a disposition accomplished without any prior notice to the debtor. In dismissals with prejudice in the second category, the debtor must have advance notice of the creditor or Trustee's request to dismiss the case with prejudice and, further, be given an opportunity to be heard by the court in opposition to the dismissal with prejudice. This notice is an elemental due process prerequisite to the dismissal with prejudice. As can be seen from the text of the Trustee's motion and notice, the Debtors in this case had no notice of any disposition other than dismissal without prejudice. As a result, this case could not be dismissed with prejudice. With the only prejudice remaining related to the

non-payment of the filing fee, and with the payment of the filing fee as tendered by the Debtors, all prejudice arising out of the dismissal of the previous case must be removed.

Now, therefore it is hereby

ORDERED that all prejudice imposed pursuant to the Court's Order of November 17, 2000, be and it hereby is vacated and removed.

SO ORDERED, this ____ of December, 2000.

Honorable James D. Walker, Jr.
United States Bankruptcy Court

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that the attached and foregoing have been served on the following:

Judson C. Hill
P. O. Box 8012
Savannah, GA 31412

Sylvia Ford Brown
Chapter 13 Trustee
P. O. Box 10556
Savannah, GA 31412

This 12th day of December, 2000.

Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court